

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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ORIGINAL

76-1280

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

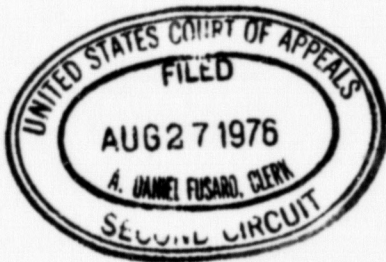
-against-

JOSE GABRIEL VELEZ-DIAZ,

Defendant-Appellant.

*On Appeal From The United States District
Court For The Eastern District of New York*

Appellant's Appendix



IRVING KATCHER
Attorney for Appellant
38 Park Row
New York, N.Y. 10038
(212) 227-0073

IRVING KATCHER
and JERALD ROSENTHAL
On the Brief

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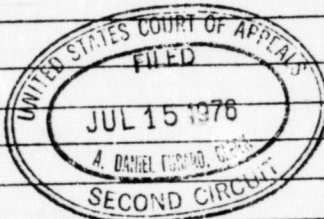
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DOCKET ENTRIES

For U. S.: O'BRIEN

U.S.

JOSE GABRIEL VELEZ-DIAZ



For Defendant:

Irving Katcher

38 Park Row, NYC.

BA 7-0073

Did distribute cocaine

ABSTRACT OF COSTS		AMOUNT	CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	DISBURSED
Fine,						
Clerk,						
Marshal,						
Attorney,						
Commissioner's Court,						
Witnesses,						

DATE	PROCEEDINGS
2/27/75	Before MISHLER, CH.J.- Indictment filed
6/75	Before PLATT, J. - Case called - Motion for bail reduction argued - motion denied from the bench
12-75	Notice of Appearance filed.
12=75	Before MISHLER, CH J - case called - deft & counsel Mr. Katcher present - Interpreter Emil Rodriguez present - deft arraigned and enters a plea of 'not guilty - May 5, 1975 for trial - motion argued by the deft for reduction of bail - bail modified to \$25,000 bond, a surety to sign with a \$2,000 cash deposit and the property of the surety.
3 25-75	Before MISHLER, CH J - case called - deft & counsel Irving Katcher present - Bail application argued - bail set at \$25,000

ZSLERIS

DATE	PROCEEDINGS
2/24/75	Notice of motion to dismiss filed ret. 5/2/75
2/24/75	Notice of motion to suppress filed ret. 5/2/75
2/75	Before MISHLER, CH.J.- Case called- Motion to dismiss argued- decision re- motion to suppress argued- decision reserved
5-75	Before MISHLER, CH J - case called - trial adjd to May 27, 1975 on consent.
5-6-75	Govts Notice of Readiness for trial filed
5-27-75	Before MISHLER, CH J - case called -no appearances - trial adjd without date.
6-6-75	Before MISHLER, CH J a case called - adjd to June 20, 1975 to set a trial date.
1/20/75	Before MISHLER, CH.J.- Case called Adjd to 7/11/75 to set trial date
7/11/75	Before MISHLER, CH.J. - Case called- deft and counsel present-trial adj adjd to 9/22/75- deft waives right to speedy trial
8-11-75	By MISHLER, CH J - Memorandum of Decision and Order filed denying motion of deft for dismissal of the indictment because of pre- indictment delay.
9-22-75	Before MISHLER, CH J - case called - deft present - adjd without date- counsel for the deft Irving Katcher, Esq. on trial in another Court.
11-20-75	Before MISHLER, CH J - case called - adjd to Nov. 26, 1975 for trial
11-24-75	Before MISHLER, CH J - case called - adjd to Dec 8, 1975 for trial on consent.
1/8/75	Before MISHLER, CH.J.- Case called- deft and counsel present-interpret present- case set down for 12/22/75 for trial
2/22/75	Before MISHLER, CH.J.- Case called- Deft and counsel present-On consent the deft the case is adjd to 1/26/76 for trial
1/26/76	Before MISHLER, CH.J.- Case called- deft and counsel present- interpreter present- ^{trial ordered and begun} jurors selected and sworn-motion to dismiss denied- trial contd t
1-27-76	Before MISHLER, CH J - case called - deft & counsel I. Katcher present - Interpreter E. Rodriguez present - trial resumed - motion by deft for mistrial is denied - trial contd to Jan. 28, 1976.
1--28-76	Before MISHLER, CH J - case called - deft & atty present - Interpreter E. Rodriguez present - Mr. Katcher counsel for the deft reported to the co that he is ill - court declared a mistrial on defts motion - Jury discharged - trial concluded - No date set for new trial.
3-5-76	Before MISHLER, CH. J. - Case called. Deft & counsel present.

DOCKET

750A

1-1-1

MISHLER, J.

TITLE OF CASE

ATTORNEYS

JUDGMENT AND PROBATION/COMMITMENT ORDER

DEFENDANT

JOSE GABRIEL VELEZ-DIAZ

DOCKET NO.

JUDGMENT AND PROBATION/COMMITMENT ORDER

No. 7449/74

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
6 18 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Irving Katcher

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.C. Sec. 841(a)(1) in that on or about August 7, 1973, the defendant, did knowingly and intentionally distribute approximately 34.39 grams (net weight) of cocaine hydrochloride, a Schedule II narcotic drug controlled substance

~~3 years and special parole term of 10 years and for the~~

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

3 years and special parole term of 10 years. If the defendant is to be deported he is not to re-enter the United States, its territories or possessions during his special parole term.

SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATIONMENT
MENT
ON

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Mar-

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

JUN 18 1976

TIME A.M.
P.M.

INDICTMENT

FILED
U.S. DISTRICT COURT E.D. NY

FEB 27 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

UNITED STATES OF AMERICA

- against -

JOSE GABRIEL VELEZ-DIAZ,

Defendant.

75 CR 111

Cr. No.
(T. 21, U.S.C., §841(a)(1))

----- X

THE GRAND JURY CHARGES:

On or about the 7th day of August 1973, within the Eastern District of New York, the defendant JOSE GABRIEL VELEZ-DIAZ did knowingly and intentionally distribute approximately 34.39 grams (net weight) of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1).)

A TRUE BILL.

Joseph P. ...
FOREMAN.

James J. ...
UNITED STATES ATTORNEY

A5

DECISION

FILED
U.S. DISTRICT COURT E.D. NY

AUG 11 1975

TIME A.M.
P.M.

W'FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75 CR 141

UNITED STATES OF AMERICA

-against-

Memorandum of Decision
and Order

JOSE GABRIEL VELEZ-DIAZ,

Defendant.

August 11, 1975

MISHLER, CH. J.

Defendant moves to dismiss the indictment because
of pre-indictment delay.¹

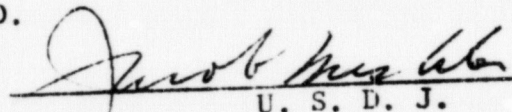
Defendant is charged with knowingly and intentionally possessing approximately 34.39 grams of cocaine on August 7, 1973. He was arrested pursuant to a warrant on February 18, 1975, and the indictment was returned on February 27, 1975. The defendant complains that he "cannot recall what, where, I was and did on that 7th day of August, 1973." He also states that he cannot now find

¹The motion initially was to dismiss on the ground that defendant was denied a right to a speedy trial. It was obvious from the supporting affidavit and argument of counsel that the motion was addressed to pre-indictment delay.

friends in the building in which he lived who have since moved and cannot be located and that "some, if not all, of these persons whom I might have been able to call and utilize their testimony are not available."

Defendant has the burden of establishing pre-indictment prejudicial delay, United States v. Smith, 487 F.2d 175, 177 (5th Cir. 1973), Schlinsky v. United States, 379 F.2d 735, 737 (1st Cir. 1967). ". . . [I]t is incumbent upon the accused to demonstrate that the delay has so impaired his capacity to prepare a defense as to amount to . . . a denial of due process . . .," United States v. Capaldo, 402 F.2d 821, 823 (2d Cir. 1968). Defendant's claim that his memory was dimmed and the general claim of possible lost testimony through the delay is not enough. United States v. Foddrell, ____ F.2d ____ (2d Cir. July 28, 1975, Docket No. 75-1048). The defendant has also failed to show that the government's delay was designed to harass or gain tactical advantage through the delay, United States v. Marion, 404 U.S. 307, 313, 92 S.Ct. 455, 459 (1971).

The motion is in all respects denied and it is
SO ORDERED.



U. S. D. J.

A7

TRANSCRIPT OF TESTIMONY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA.,

Plaintiff,

-Against-

JOSE GABRIEL VELEZ-DIAZ

Defendant

-----X

MARCH 31, 1976
225 Cadman Plaza East
Brooklyn, New York
12:00 O'clock Noon

BEFORE:

HONORABLE JACOB MISHLER,

Chief U.S.D.C.J.

PAUL GOLDWERT, C.S.R.,
Acting Official Court Reporter

I hereby certify that the foregoing is
a true and accurate transcript from my
stenographic notes in this proceeding.

Paul Goldwert, C.S.R.

Official Court Reporter
U. S. District Court

2

1 A P P E A R A N C E S :

2

DAVID G. TRAGER, ESQ.

3

UNITED STATES ATTORNEY

4

BY: ELIA WEINBACH, ESQ., AUSA

5

IRVING KATCHER, ESQ.

6

ATTORNEY FOR DEFENDANT.

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THE COURT: Mr. Weinbach.

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MR. WEINBACH: May it please the court, Judge Mishler, Mr. Katcher, Madam Forelady, ladies and gentlemen of the jury, in a few minutes you will be asked to take this case into the jury room to deliberate, to determine whether the government has proved its case beyond a reasonable doubt. Before you do so however, the government and the defendant have the opportunity of reviewing with you the evidence that has been presented in this case.

Remember the evidence in this case is only the testimony of the witnesses who have taken the stand and the exhibits that were received. Nothing else is evidence.

The second purpose of summation is to sort out the important details that have been brought in from the unimportant ones, to sort out what the real issues are in this case.

A trial is an effort to seek the truth. It is not a battle where minor, irrelevant details score points on some mythical scoreboard. I asked you to recall my opening statement. If you recall that opening statement, I told you to pay particularly close attention to the testimony of Detective Horace Balmer. I asked you to remember the testimony of Detective Balmer because I think it is on that testimony, as well as the testimony of the defendant who took the stand, that you will determine whether or not, in fact, Mr. Velez-Diaz sold cocaine on August 7, 1973 to Detective Balmer.

In a little while, we will compare the testimony of Detective Balmer and the testimony of Mr. Velez-Diaz. There is obviously a conflict. Detective Balmer told you his story which was on that day, he bought cocaine from Mr. Velez-Diaz, Mr. Velez-Diaz said no, no such transaction took place.

I will also ask you to recall a word that Mr. Katcher used and we will go into that in a little more detail. That word was "motivation." You are not only asked when you consider the testimony to consider what was said and to use your common sense and experience in everyday affairs but you are also asked why did a particular witness say what he did; what reason, what motivation did he have to say that particular story. We will go into that in a little while.

4 1
2 As you are all familiar, the charge in this case
3 is a simple and important one. It charges that Mr.
4 Velez-Diaz sold cocaine on August 7, 1973. Judge
5 Mishler will instruct you on the law. He will tell
6 you what the government must prove in order for you
7 to find the defendant guilty. I submit to you,
8 ladies and gentlemen, that the only issue in this
9 case, which started out to be a short case, is whether
10 or not you believe Detective Balmer. That is all.
11 That is the only issue in this case. Whether or not
12 you believe, in fact, he bought cocaine on that day,
13 August 7, 1973.

14 Again, I would remind you, judge that issue
15 solely on the evidence but also using your common
16 experience and your everyday experience. Ask yourselves
17 would you believe a man like Detective Balmer.
18 Would you believe a man like Jose Gabriel Velez-Diaz
19 in your everyday experience.

20 There have been a number of what I would call
21 non issues in this case raised during the lengthy
22 cross-examination by Mr. Katcher. I will review several
23 of those non issues. There was no question of
24 the fact that Jose Velez-Diaz lived at 419 Franklin
25 Avenue on August 7, 1973. He told you that on August
7, 1973 he was in his own house. That is not an issue.

1
2 There is no question in this case, I submit,
3 ladies and gentlemen, that Exhibit 2B contains co-
4 caine. You may recall, that the government called a
5 DEA chemist, told you he had performed tests on this
6 white substance and based on the tests, he concludes
7 that this substance is cocaine. There is no question
8 about that.

9 You heard the witness say he has testified on
10 numerous occasions. I believe he said 80 cases, and
11 ask yourselves is there anything of the evidence
12 which would show to you that there is any doubt that
13 this is cocaine. I submit that there is nothing in
14 the evidence which would show you that.

15 There is no question, too, that this cocaine was
16 gotten by DEA Chemist Manning from Officer Ronald
17 Heckman and Detective Balmer got this, of course,
18 in the same condition that Detective Balmer purchased
19 it from Velez-Diaz.

20 THE COURT: In all these cases when you say
21 "there is no question," I want the jury to understand
22 that you are saying you feel the proof is overwhelming
23 but by indicating that there is no question you are
24 not saying that the defendant concedes any of these
25 issues.

MR. WEINBACH: Thank you, your honor. I submit
ladies and gentlemen, that after you have heard the
testimony you will have no question that this cocaine

6 1 MR. KATCHER: I do not want to object.

2 THE COURT: I will allow him to say "no question"
3 as long as the jury understands.

4 MR. KATCHER: If he says "in his mind." He is
5 not saying that. Let him add that.

6 THE COURT: I will ask Mr. Weinbach to refer to
7 the evidence when you say "there is no question a-
8 bout."

9 MR. WEINBACH: Another nonissue in this case is
10 the use of a confidential informant, Mr. James
11 Thomas. You will all know that Detective Thomas
12 testified that he went with Mr. Thomas on August 7,
13 1973 to Mr. Diazs' home. Detective Balmer is not
14 on trial. Mr. Thomas is not on trial. Police De-
15 partment is not on trial. The confidential inform-
16 ant is not on trial. The only person on trial is
17 Mr. Velez-Diaz and, by the way, I submit that it
18 would not strike anyone as strange that confidential
19 informants are used in cases like this.

20 This is cocaine. This is an illegal sale that
21 we are talking about. Detective Balmer testified
22 that he had never met Mr. Velez-Diaz prior to August
23 7, 1973. When we are dealing with illegal transac-
24 tions there is a certain amount of trust, I submit,
25 that you can infer from the evidence that has to be
developed between the seller and the buyer and the
only way Detective Balmer could buy cocaine was

7 1 through someone who knew Mr. Velez-Diaz.
2

3 You recall that Detective Balmer stated he had
4 conversations with Mr. Thomas prior to going to Mr.
5 Velez-Diaz in the car, I believe it was, and Mr.
6 Thomas stated he told them a physical description.
7 He said he didn't think he was armed, and I submit
8 to you I can infer Mr. Thomas knew Mr. Velez-Diaz
prior to August 7, 1973.

9 There is also another nonissue in the case about
10 arrangements. You may recall lengthy testimony
11 from Detective Balmer by Mr. Katcher: "well, did
12 you make arrangements with Mr. Velez-Diaz? Did Mr.
13 Thomas make arrangements with Mr. Velez-Diaz? Were
appointments made by Mr. Velez-Diaz?"

14 I believe to each and every question, Detective
15 Balmer stated, "no, I didn't make arrangements.
16 Officer Heckman did."

17 When Officer Heckman took the stand, he said,
18 "we made the arrangements earlier in the afternoon
19 and Mr. Thomas arranged to make the purchase later
in the afternoon."

20 What happened after August 7, 1973, I submit,
21 is also a nonissue. The government charges only
22 one crime took place on August 7, 1973. What hap-
23 pened afterwards, I submit to you, ladies and gen-
24 tlemen, is totally irrelevant. The fact that Mr.
25

1
2 Velez-Diaz was not located after August 7, 1973,
3 that is not an issue.

4 You heard testimony why Detective Balmer did not
5 go to arrest him immediately after the purchase.
6 Detective Balmer said, one, he did not want to blow
7 his cover. I think those were his words. Secondly,
8 He wanted to go back to Mr. Velez-Diaz and buy more
9 cocaine. To go back to arrest him would, obviously,
10 defeat that purpose. So that is not an issue. What
11 happened after August 7, 1973 is not an issue.

12 Another nonissue. You may recall field tests
13 were performed after the purchase. I think it was
14 at Bergen Street and South Ninth Street, and there
15 was lengthy cross-examination about how far 419
16 Franklin Avenue is from Bergen Street; five minutes,
17 three minutes, ten minutes. What difference does it
18 make how far 419 Franklin Avenue was? It is just
19 an effort to confuse you.

20 I could go on and on with other examples of
21 what I consider and, I submit to you, are nonissues
22 but let's concentrate on the only issue in this case.
23 Let's go through quickly what happened on August 7,
24 1973.

25 Detective Balmer testified that on that day
arrangements had been made. He met with Mr. Thomas
and he went with Mr. Thomas to 419 Franklin Avenue.

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Again he testified he had never been to Mr. Velez-Diazs' house. He was followed, you will recall, by Officer Heckman. Officer Heckman said he conducted surveillance with other officers. Officer Heckmans' car, I believe, was about a block away and he saw Detective Balmer get out of the car with Mr. Thomas.

They entered the building. That building was 419 Franklin Avenue. Detective Balmer then went into an apartment. He met a man. He said, "that man sitting over there," Mr. Velez-Diaz. They got into the house. There was another man, a black painter. Detective Balmer described the condition of the house. He said they were painting. The black painter was in the living room and he had painting garb on and Detective Balmer described what Mr. Velez-Diaz was wearing. I think he said he was wearing beach garb and bermudas.

They went into the kitchen, Detective Balmer, Mr. Thomas and Mr. Velez-Diaz. The black man remained in the living room. They spent a short time in the kitchen. The question was asked: How much did the coke cost? \$600. Mr. Velez-Diaz spooned out from a canister in the kitchen cabinet four spoonfuls and put it into two plastic bags.

I submit to you, ladies and gentlemen, that is the cocaine he put into the plastic bags. (indicating). Money was turned over to Mr. Velez-Diaz by

1 Detective Balmer. Then Detective Balmer said he
2 asked for \$10 back and he took the \$10 back and I
3 think the pretext he used was, " I need some money
4 for gasoline." There was some question about that
5 but, I submit to you, ladies and gentlemen, that
6 the reason Detective Balmer took that money was to
7 give him a reason to come back. Didn't it make
8 common sense that one way that Detective Balmer
9 could insure he could come back to Velez-Diaz was,
10 " I owe you \$10. I will come back at a future time
11 and pay you back \$10."

12 Then Detective Balmer and Mr. Thomas left and
13 they were there for about five minutes. There was
14 no one else in the apartment other than the black
15 painter and he was not in the kitchen. They went
16 out into the car and drove out to South Ninth St.
17 and Bergen St. and met with Officer Heckman. A
18 field test was performed. Based on the experience
19 of the officers, it was considered to be positive
20 for cocaine.

21 They then returned to their offices. This
22 bag was weighed, sealed, and put into the plastic
23 bag. Officer Heckman said he put it into an en-
24 velope, sealed it and put it into a vault, and,
25 subsequently, I think the next day, Chemist
Manning tested it and it came back to court (indi-
cating).

1 1
2 That is the government's case; the testimony
3 of Detective Balmer, the testimony of Officer
4 Heckman, the testimony of the chemist.

5 What is the defense case? Well you heard at
6 the beginning of the case that the defense has no
7 obligation to present any case whatsoever. But,
8 in this case, the defendant did take the stand.

9 Prior to the defendant taking the stand, I pre-
10 pared a summation and I was going to submit to
11 you that the only defense in this case was one
12 of confusion, diversion, distraction, to make you
13 concentrate on points other than August 7, 1973.
14 That is certainly one defense and, I think, that
15 is certainly one defense that is still there.

16 Now, there is a second defense. It came out
17 of the words of the defendant. The defendant
18 basically said I didn't do it. I was there on
19 August 7, 1973 but I didn't sell any cocaine.
20 Two men came to my apartment. They were Postal
21 Inspectors or Postmen. They didn't wear uniforms.
22 They told me about some stolen letters from my
23 mail. They went into my kitchen, and that is the
24 defense. I didn't do it.

25 Judge Mishler will tell you how to evaluate
witnesses and testimony. He will instruct you on
the law about that. I submit to you, ladies and

1
2 gentlemen, that after you saw Mr. Velez-Diaz
3 take the stand, you are the best judges of whether
4 or not Mr. Velez-Diaz was telling the truth. I
5 submit to you that Mr. Velez-Diaz did not have any
6 hesitation in lying right from the start.

7 Do you remember what the first question was?
8 "Mr. Velez-Diaz, do you understand English?"
9 Quicker than a wink, the answer is, "no, no, no."
10 Then there was suddenly a pause. Then the Spanish
11 Interpreter interprets the question to Mr. Velez-
12 Diaz in Spanish and then it is my recollection
13 that the answer came back "no" in Spanish.

14 I asked a series of lengthy questions about
15 Mr. Velez-Diaz's ability to understand English.
16 You could be the judges of whether or not he
17 understands English. First of all, he has been
18 here approximately three and one half years. He
19 is a young man. He appears to be of reasonable
20 intelligence. He says he goes about the city
21 alone, travels on the subways. He owns a tele-
22 vision. You can be the judge of whether or not
23 he understands English in general.

24 Let's concentrate on the nature of the con-
25 versation. Mr. Velez-Diaz stated he never spoke
to anyone in English. We are not talking about
a lengthy conversation at 419 Franklin Avenue.

13 1
2 We are not talking about a discussion about
3 Shakespeare or how the Mets are doing. We are
4 talking about a simple conversation. How much did
5 it cost. Quick as a wink, the answer \$600. Again,
6 based on your common sense and your experience, ask
7 yourself even if you believe Mr. Velez-Diaz's
8 knowledge of English is not as good as yours and
9 mine, ask yourselves whether it is reasonable that
10 he understood what was going on on August 7, 1973
11 and ask yourself this. Some of you may have visited
12 foreign countries as tourists and you may have pur-
13 chased items from people whose language you did not
14 speak and ask yourselves isn't it reasonable that
15 when you travel, what is the first thing you learn
16 in a foreign language? You ask yourself the ques-
17 tion. How much does things cost and what is the
18 first thing you learn when you get off a plane?
19 You learn the currency; how many dollars for
20 whatever the foreign currency is.

21 I submit to you if Mr. Velez-Diaz knows no
22 other English than "how much"--he also must have
23 seen dollar bills, ten dollar bills, twenty dollar
24 bills, and one hundred dollar bills.

25 This is interesting because Mr. Velez-Diaz's
testimony concerning what was in the apartment on
August 7, 1973 almost matches to a tee the descrip-
tion that Detective Balmer gave you. Remember

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what Detective Balmer said. There was painting going on in that apartment. There was a black man in the apartment. He was painting in the living room. He didn't come into the kitchen.

What did Mr. Velez-Diaz say? There was a black painter in the living room. He didn't go into the kitchen when I spoke to those two men he didn't know.

How did Detective Balmer know unless he was in that apartment that it was being painted, painted by a black painter in the living room who did not come into the kitchen? I submit there is no other explanation, no other explanation in the world, other than the fact that Detective Balmer was in that apartment. It just doesn't make sense.

The only conflict, of course, is one that Mr. Velez-Diaz says, " I didn't sell them cocaine, " and the nature of the clothing Mr. Velez-Diaz said he was wearing on that day. Mr. Velez-Diaz, I think, said he was wearing jeans. What difference does it make? Detective Balmer said he was wearing bermudas. Mr. Velez-Diaz said he was wearing jeans. That is irrelevant.

There was no one else in the apartment. Detective Balmer saw that man and he purchased cocaine from him. That is all that is important.

15 1
2 You may recall at the end of the cross-ex-
3 amination of Mr. Velez-Diaz, I asked him about
4 Government's Exhibit 4 in evidence. I do not be-
5 lieve any of you have seen this exhibit, but you
6 you will be able to if you want to in the jury room.
7 Government's Exhibit 4 in evidence consists basic-
8 ally of two applications for registration or title.
9 You may recall Inspector Salk came from Albany
10 and these were received and he told you what these
11 were.

12 There is one application for a car on June 22,
13 1973 and there is one on August 20, 1973. Mr. Velez-
14 Diaz said, " yes, I own those two cars described in
15 the applications. Yes, I know the two men who sold
16 them to me and yes, those are my signatures on the
17 application." One signature is Jose Gabriel Velez.
18 The second signature is Jose Gabriel Velez-Diaz.

19 I asked him a question about the front of the
20 applications. Most of you must be familiar with
21 the information: your name, your address, where
22 you live. You will be able to see Velez-Diaz,
23 419 Franklin Avenue, Brooklyn, N. Y., Kings. I
24 asked him, " Did you fill out those applications? "
25 " No. " " Do you know who filled those out? " " No. "
" Have you ever seen that handwriting before? " " No. "
" Are you familiar with that type of handwriting? "

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" No. "

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Why would he say that? What does he have to gain by saying " no, I didn't fill out the application "? I will tell you one motivation. To fill out an application, it is in English and you have to understand English.

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Unfortunately, Mr. Velez-Diaz could not be consistent in his lying or he tried to be consistent. If you believe he did not understand English, it would make sense that he could not fill out an application. I submit to you, ladies and gentlemen, that he filled out this application. He knows how to read English but he got tripped up in his own lie.

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It is an interesting development, what you might consider the Brooklyn Telephone Book Defense.

MR. KATCHER: I object. I do not know what the reference is to a Brooklyn Telephone Book Defense.

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THE COURT: I do not know what Mr. Weinbach has to say. Go ahead.

MR. WEINBACH: The defense would have you believe that Detective Balmer didn't know anything about Mr. Velez-Diaz. He never had dealings with him and somehow Police Department chose Mr. Velez-Diaz to bring a case against. They picked a name at random. No explanation. That is the defense ladies and gentlemen.

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There is one other point, something you may consider. Mr. Velez-Diaz stated he had a scar on his face for ten years. I do not know if that is true. There is an exhibit in evidence, a photograph of Mr. Velez-Diaz. He said, "it is my photograph." You can look at that photograph and ask yourselves whether it is good. To my eyes, I submit I do not see a scar in that picture. He may have had that scar. It is a minor point but I submit to you, ladies and gentlemen, based on the testimony of Mr. Velez-Diaz, you can believe that he did not have that scar, that that scar is a new scar. Take a look at it.

My final point. Judge Mishler will instruct you on how you are to credit the testimony of witnesses in general. The defendant has taken the stand and I ask you, based upon your everyday dealing with other people in life, that you make certain judgements. Everyday you deal with business people; you deal with bosses or employees. You deal with your families, with relatives, and you make certain judgements about people, whether they are telling you the truth or not. It Happens. It is only natural. Judge the witnesses the same way you would judge other people. Ask yourselves whether or not you would believe Detective Balmer, for example, in everyday life. Would you believe

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2 Officer Heckman? Would you believe the chemist,
3 Inspector Salk?

4 Take their testimony and weigh it against the
5 testimony of Mr. Velez-Diaz. What you believe
6 Mr. Velez-Diaz based on what he told you, based on
7 the way he responded to the questions? Then after
8 you have weighed that in your mind, ask yourselves
9 who stands to gain from this case? Who stands to
10 gain if he can convince you what he is telling you
11 is the truth and who stands to lose if he does not
12 convince you that he is telling you the truth?

13 Review the testimony amongst yourselves. Dis-
14 cuss it. It is your obligation to do so. Review
15 the exhibits. After you have discussed the case
16 amongst yourselves, the government will ask you to
17 return a verdict of guilty as charged. Thank you
18 very much.

19 THE COURT: Mr. Katcher, yesterday we dis-
20 cussed the possibility of Mr. Velez-Diaz walking
21 before the jury rail and exhibiting the scar.

22 MR.KATCHER: Can we do that now before I
23 address the jury?

24 THE COURT: Yes. Suppose you do that.

25 MR. KATCHER: Tell him to walk in front of
the jury box.

THE COURT: All right. The jury can stand up
and have a look. Point to the spot.

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(Whereupon, the defendant walked before the jury rail.)

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THE COURT: Ask him to turn his head slightly to the left so they can see it. Thank you.

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Mr. Katcher, you may proceed.

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MR. KATCHER: If it please your honor Mr. Weinbach, ladies and gentlemen of the jury, it becomes my responsibility at this time to make some comments about what transpired during this trial. When I speak of what transpired, I am naturally referring to the evidence. Mr. Weinbach at the very inception told you there was only one issue in this case and there is only one person who should be considered. That was Detective Balmer.

There was very extensive cross-examination by me and I did not know if he is being critical of me because there was extensive cross-examination but everything that transpires during the course of a trial becomes important because in a trial, we are seeking and searching for the truth. It is not necessarily what a particular witness says on direct examination that members of a jury are compelled to believe everything he says or what the witness says on direct examination is to be believed. You believe testimony which you think is creditable, which you believe stands up against the light of day, what you from your everyday life in

2 dealing with people of all types and sorts make
3 you form a judgement as to what you will accept
4 or what you will reject as being credible and
5 believable.

6 It is very easy for a prosecutor to stand here
7 and say you must believe Detective Balmer because
8 he is a cop.

9 MR. WEINBACH: Objection. I did not say that.

10 MR. KATCHER: That is your inference.

11 THE COURT: If there is any such inference,
12 then it is an improper inference. Mr. Weinbach
13 did not say it and he just disclaimed any such
14 statement or argument.

15 MR. KATCHER: You folks when you were chosen
16 as jurors told his honor and Mr. Weinbach and
17 myself that merely because a person is a police
18 officer, that his testimony is not to be believed
19 any more or accepted in any greater fashion than
20 a person who is not a police officer. When you
21 were sworn as a juror, that was one of the obli-
22 gations that each and every one of you assumed;
23 not to be bound by any person's thoughts by way
24 of testimony, but what you consider upon the light
25 of day and upon what a search reveals.

In this case, we have for the prosecution a
chemist, a man from Motor Vehicle Bureau, Detec-
tive Balmer, Police Officer Heckman. I will take

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them in order. The first witness is Mr. Manning who is a chemist.

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He has been a chemist for so many years. He testified in court. His testimony has been accepted. On direct examination, he tells you he conducted a certain analysis of this white substance (indicating) which the Government claims is cocaine. Maybe it is. Maybe it is not. I am not a chemist.

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On cross-examination, after asking him about certain tests that he performed, I showed him a paper that he had prepared in his own handwriting and I asked this particular question on two occasions to make sure that I understood it and you understood it. The question was: " This statement at the bottom of your paper "--while this paper is not in evidence, I am sure your recollection will be refreshed in a moment's time. I asked him to read what it says at the bottom and he reads, in substance: " the sample that resembles cocaine hydrochloride." Is it cocaine--this is the expert--or isn't it cocaine? It resembles cocaine hydrochloride. This is after a series of tests that the witness professed to have conducted.

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Then I asked him: " Is your work in a laboratory checked at any time? Was this checked by

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any supervisors or any other chemist?" " No. "

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Then the infallible man is asked another question.

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" Did you ever make a mistake or an error?" " No. "

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This is a believable testimony?

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MR. WEINBACH: Objection. That was not the testimony.

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MR. KATCHER: If I am misquoting or enlarging upon any statement of testimony which I believed was said, disregard what I have said. You are the sole judges of testimony, as his honor will tell you. I am giving you the best recollection as to what my notes reveal taken during the course of the trial. I have no stenographic minutes of each and every word, and each and every question which was asked and answered. So forgive me if I make a mistake or say something based upon evidence which does not jibe with your recollection. Disregard it. You determine in your own minds. The twelve of you collectively assess what is said. It is not being done deliberately or to mislead or confuse. It is my recollection and pure and simple, that is all it stands for.

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The next witness is the key witness for the Government, Detective Balmer. He gave you his background. He tells you about meeting Thomas who is chief in charge of the case, who is Heckmar. He was introduced to Thomas, spoke to Thomas, got a

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description, found out from Thomas that this man he is going to see is not a dangerous person and a very significant thing occurs. We have a situation where \$600 of your money, my money, the money that we contribute to the government, is used to make a claimed purchase of narcotics. The money is recorded. The serial numbers on the bills are recorded.

THE COURT: I think it is quite immaterial whether it is your money or my money.

MR. KATCHER: Government money.

THE COURT: I do not think it is any part of the case.

MR. KATCHER: The serial numbers on the bills are recorded on the bills for a specific purpose; so they could be retrieved, recovered and shown to be in the possession of a person who allegedly received that money in payment for a narcotics sale.

Of course, he gets a description from Thomas of what this subject, who is now the accused person, Velez-Diaz, what he looks like, and they have no picture of this man, never had a picture of this man, who was never the subject of any inquiry pertaining to narcotics to that claimed specific day of August 7.

They are going out with an informer who supposedly--and I use the word deliberately--supposedly

1 knows the subject. He takes the \$600 puts it in
2 his pocket and before they go out the informer whom
3 they are relying upon is searched, not once but
4 three times searched. A man they are trusting to
5 set up a deal, who is accompanying an officer, who
6 is going to be in the presence of an officer when
7 an alleged sale or deal takes place, he is searched.
8 Is the officer searched? No, he is not searched be-
9 cause he is trusted. He is a cop. Of course, we
10 read about cops being arrested or busted--

11 MR. WEINBACH: Objection, your honor.

12 THE COURT: Strike it out. The jury is to
13 disregard it.

14 MR. KATCHER: The cop is trusted, in this par-
15 ticular case, Detective Balmer. Now they go to the
16 house and he describes what happened at the house,
17 419 Franklin Avenue. There is no question about
18 419 Franklin Avenue. There never was but this 419
19 Franklin Avenue address is magnified to create the
20 illusion that there is something secretive about
21 419 and that 419 does not exist. That is best
22 proved--I will come to that later. Let's stick to
23 Balmer.

24 He tells you about something that happens in
25 the kitchen. something is removed from a closet,
a kitchen cabinet. Some white powder is spooned
out of that canister as Mr. Weinbach described

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and approximately an ounce is put into a plastic bag and given to Balmer in the presence of Thomas, supposedly, and the \$600 is handed by Balmer to Velez-Diaz.

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Balmer takes back \$10 claiming he wanted it for gas. They leave the apartment. They are in the apartment only three minutes, according to Balmer's testimony. They go to the place where they are supposed to meet Heckman and other officers of that unit and he mentioned a Spring, a Vasquez, a few others who were part of the group and that these names were also confirmed by Patrolman Ronald Heckman when he took the witness stand.

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What happens at the scene, the prearranged meeting place? There is a field test made. Part of this white substance is placed in a vile containing an acid, and they get a blue color. I think he said that was an indication that the substance might be cocaine, a narcotic drug. He tells you that they are three or four minutes away from the house. Bear in mind the background, the scene. When Balmer and Thomas leave the house, the balance of the white powder from which a portion was taken to be placed in a plastic bag is returned to the cabinet. This is the source of source of supply. This is the cache. It would take three minutes to get back to the house knowing that there is a

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2 supply of cocaine, which they assume by the vir-
3 tue of the field test that it was proved to be
4 cocaine. The seller is in the apartment with
5 \$590 and they do not go back to make an arrest
6 when they are satisfied that the deal or the ob-
7 ject that they purchased is cocaine. In their
8 minds, they are all satisfied, the entire group.

9 The lame excuses given by Mr. Weindach in
10 talking to you based upon the testimony of Balmer,
11 that the reason he did not go back was because
12 he wanted to make a second purchase. How ridic-
13 ulous is this? You have a cache of cocaine in
14 the apartment. You are three or four minutes away
15 from that apartment, 419 Franklin Avenue. You have
16 the man who sold you cocaine with \$590 of registered
17 governmental funds in his possession, and they use
18 the excuse they want to make a second purchase.
19 That is why they were afraid to break the cover.
20 Fine. You do not want to break the cover. You
21 have Heckman, you have Vasquez and other officers.
22 So you send one of the other officers back. You do
23 not have to use Balmer.

24 I asked: " Did you get a search warrant to go
25 back and search the house? " " No." What is the
purpose of registering this money? The money
would have been proof absolute, proof positive that
I paid you this money and, in turn, you gave me a

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substance which you claim is cocaine and which the chemist says resembles cocaine.

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So that Mr. Weinbach, in talking to you, says to you we only have to pay attention to what he says and everything else plays no part. Is that a fact? Is that the only thing in this case? Do attitudes, do reactions to matters that occur as a result of an alleged offense take place?

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He got a description and he never had a picture and that is the first and only time Balmer says he saw Mr. Velez-Diaz. I asked him what did he look like and any marks or scars. No, nothing. He is standing along side of him while this deal is going on. He is telling you that long hair, that he has--I am trying to think of the type of skin--a soft skin. You saw the gentleman, my client, you saw his scar.

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Just to keep on the identification aspect for the moment, when Heckman is on the witness stand, he gives you a description which is entirely different, which you recall it than that of Balmer. He also tells you that in speaking to Thomas, because Thomas was his confidential informer, his stoolpigeon, that my client spoke little English--little English. Balmer tells you he spoke English completely through a conversation without any difficulty; he understood, responded

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2 to everything they were talking about. These are
3 two different versions.

4 Now, you heard my client when he took the
5 witness stand and he is not compelled to take the
6 witness stand. There is nothing in the criminal
7 law which says the defendant must take the wit-
8 ness stand. So you have to weigh not only what
9 the witness says on direct examination but what
10 he says on cross-examination to place credibility,
11 to believe whether the testimony is believable in
12 the face of what has been exposed on cross-exam-
13 ination.

14 He has from that time on never seen Velez-
15 Diaz again. He walks into this court almost two
16 years later--more than two years. It happened
17 August 7, 1973, and he points out Mr. Velez-Diaz.

18 MR. WEINBACH: Objection, your honor.

19 THE COURT: I will allow it.

20 MR. KATCHER: He identifies Mr. Velez-Diaz
21 as the gentleman with a full beard wearing a
22 brown jacket. He has not seen this man in over
23 two years, never had a picture of him until the
24 man is arrested February of 1975, twenty months
25 after August 7, 1973, and he wants you to believe
that he remembers this man, seeing him once for
three or four minutes back on August 7, 1973,
having had contact with hundreds of people during

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2 that ensuing period of time.

3 Low and behold. A picture is produced and
4 placed in evidence. Who is the picture of? Mr.
5 Velez-Diaz taken in February of 1975. So when you
6 look at the picture--and just to digress for a mo-
7 ment, you recall did he have conversations with
8 Mr. Weinbach prior to appearing in this court to
9 give testimony? Yes. Did you discuss the case?
10 Yes. Did you go over the case? Yes, many times.
11 The photo is used. You have every right to as-
12 sume the picture is used.

12 MR. WEINBACH: Objection.

13 MR. KATCHER: I said you have every right to
14 assume.

15 THE COURT: You may continue.

16 MR. KATCHER: A cop who has been on the police
17 force for a number of years knows when he goes into
18 a court room, he knows who the prosecutor is and he
19 knows that the person who he is going to appear in
20 court to testify against is certainly not going to
21 sit with a prosecutor, and he will sit at a de-
22 fense table and when he has a picture prior to
23 walking into the court room or seeing the picture
24 prior to walking into the court room and the man
25 sitting at the table resembles the image on the
picture, who else would it be because the man's
name is Velez-Diaz.

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This is two years later, bear in mind, when the prosecution wants you to accept Balmer's testimony as being the gospel and that is what he is trying to make you understand; it is the gospel.

Now, in the face of cross-examination and what has been revealed on cross-examination, can you give credibility or place credibility to that type of testimony? Would you believe it? Can you believe it? Is it a true story? Mr. Weinbach tells you--I have to digress because I want to go through a certain pattern because it is appropriate at this time.

How in the world would Balmer know the layout of the apartment, about the painting, about a black man? I have to digress because I have to go now to Heckman and I will come back to Heckman. Heckman, on direct examination, makes no reference whatsoever to his sending any of his officers, a man by the name of Sprain, and a man by the name of Vasquez who were assigned to his unit to go to 419 Franklin Avenue. When I asked him about daily logs being maintained by the government showing the activities or the claimed activities of the men in his unit, he says he has logs, and there was a recess to permit Mr. Heckman to go to his office to get the logs.

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He brings back a series of papers which were daily logs. In one of those logs on cross-examination of Mr. Heckman, I asked him about whether he had sent any men to 419 Franklin Avenue prior to the claim of Balmer going to 419 Franklin Avenue accompanied by Thomas. The answer was yes. Who did you send? Sprain, Vasques, one of the patrolmen in the police department and the other was a state trooper assigned to that joint task force unit. Did they go into the apartment? Yes. Did they see people in the apartment? Yes. Did they talk to anyone in the apartment? Yes.

Nothing was ever said under examination through Mr. Weinbach about those people under the control of Heckman going to this apartment. So in response to Mr. Weinbach's rhetorical question to you: How did Balmer know about the painting, about the condition of the rooms and what the layout is there, the answer is very simple. These two men had been there several hours prior to Balmer going there. It is reasonable to assume that they told the officer of the layout of the apartment, what they can expect to find.

So when my good friend here tells you how would he know, the answer is very simple, as simple as the five fingers on my hand.

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We then have a witness from The Motor Vehicle Bureau of the State of New York, a most important witness, who is subpoenaed to come down here with motor vehicle records. He brings certain records certified the fourth day of April, 1976.

MR. WEINBACH: The fourth day of April?

MR. KATCHER: Fourth day of February, I'm sorry. Very important documents. What is important about this; to show that 419 Franklin Ave. did exist back in August of 1973 and that a person by the name of Jose Velez-Diaz owned an automobile from that address.

Another significant thing; Heckman's testimony. How did you get the name Velez? We got the name from a mailbox in the hall. Did you know the name of the person before you sent Thomas and Balmer? No. That is when I was asking him about where did they get the name that appeared on one of these glazine envelopes.

MR. WEINBACH: Your honor, I object to the mischaracterization of the testimony.

THE COURT: If the testimony is recalled by the jury differently than what Mr. Katcher is reciting, disregard what he says. Your recollection of the testimony is what counts and under our present procedure, Mr. Weinbach, you have a rebuttle.

2 MR. KATCHER: We have Mr. Salk from the Motor
3 Vehicle. Mr. Weinbach, if you recall, asked Mr.
4 Velez-Diaz: Is this your signature? Yes, it is
5 my signature. Did you fill out the application?
6 No.

7 What is so significant about whether he filled
8 out the application or not with relation to this
9 case as to whether there was a sale or whether this
10 entire thing was a frame, whether it existed or
whether it did not exist?

11 Let's have Mr. Heckman. As I have indicated
12 to you, no one told you until it was brought out
13 on cross-examination about the visit of the two
14 police officers or two officers--one is a policeman
15 and the other is a state trooper--of having been
16 sent to the apartment to set up and get the layout
17 of the apartment. Heckman did not tell you that he
18 saw Thomas and Balmer enter the apartment. The only
19 thing he told you is that they entered the building
not the apartment.

20 Please bear that in mind. The only other per-
21 son who supposedly went into the apartment with
22 Balmer is the illusive Mr. Thomas, the informer.
23 I do not have to relate to you or challenge your
24 thinking on what an informer is or what he repre-
25 sents and how much you can trust him and how much
you can believe in him. He is not called. He is

1 not called and the challenge is going to be made
2 to me that possibly I could have called him as a
3 witness. Yes, that is true, but under our law in
4 a criminal case a defendant need not produce any
5 witnesses and his honor will so tell you that.
6 This is the government's witness, basically. They
7 employed him.

8 MR. WEINBACH: Objection.

9 MR. KATCHER: They used him. I do not know
10 about employed. They used him. He was a regis-
11 tered informer. He was given a number, as you
12 heard the testimony. He was on the records of the
13 Joint Task Force as an informer. Whether he got
14 paid or not, I do not care one iota but he was
15 their man. He is the man they said supposedly
16 introduced the cop, the detective to my client.
17 Is he produced to support that story? This is
18 what the government wants you to believe.

19 The detective's testimony which has been
20 shattered, in my humble view by cross-examination
21 who was shown to be a man whose creditability cannot
22 be accepted and, yet, the only other source, call it
23 a version if you wish, is Thomas. He is not pro-
24 duced.

25 You have a right, each and every one, as his
honor will tell you, to infer that the failure of
the government to call a witness who can give tes-

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timony in connection with this subject matter on trial, you have a right to infer that the failure by the government to call that witness would be unfavorable to the government.

MR. WEINBACH: Objection. I will ask for a ruling.

THE COURT: We will take this up in the recess. I thought we had an understanding on that, Mr. Katcher.

MR. KATCHER: I am going to come to this in a minute. I will cover that part. The argument is going to be advanced that I could call Mr. Thomas, yes. As I said a moment ago, yes, I could have called him if I saw fit, but it is not my obligation representing a defendant on trial to produce witnesses in the case.

His honor will tell you the defendant has a right to sit mute. He does not have to utter one word. He does not have to produce a single witness or spread a piece of proof of anything because the burden of proof is on the government, the prosecution from the inception of the commencement of the case to the last moment of the case, and that burden, his honor will tell you, never shifts to the defendant.

They have to satisfy you beyond a reasonable doubt that they have proved to your satisfaction

1 and moral certainty that this man who is now the
2 subject on trial in truth and in fact committed
3 the crime that they charged him with.
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5 His honor will also tell you that this ac-
6 cusation which was read to you by his honor at
7 the very commencement of the trial is only a
8 piece of paper. It is what brings a person before
9 a court for a trial, no more than a summons in a
10 civil suit served upon a person being sued to
11 bring the case to court, and it must be proved
12 even in a civil court to the satisfaction of the
13 judge or to the court that the claim has been
14 established.

15 But the rule of law in a criminal case is
16 different. Here it must be established beyond
17 reason, beyond reasonable doubt. The burden of
18 proof never shifts to the defendant. He remains
19 cloaked with the presumption of innocence and
20 this, under our form of government, is the most
21 wonderful thing that has ever fallen upon us
22 since the creation of our republic, but it changes
23 in many instances what some of the old countries
24 in Europe did where a defendant on trial--

25 MR. WEINBACH: Objection, your honor.

THE COURT: I will allow a little rhetoric
during the bicentennial.

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2 MR. KATCHER: In some of the European coun-
3 tries, even to this day, the defendant in a crim-
4 inal case has to prove his innocence. Here,
5 thank the almighty, we have an entirely different set of
6 rules and we have this wonderful democracy of ours.

7 You will also remember and I remember asking
8 Detective Heckman about the defendant, my client,
9 Mr. Velez-Diaz: Did your files in your office re-
10 veal any narcotics activity? No. Did you have a
11 picture? No. Was he ever arrested for narcotics?
12 No.

13 I expressed these particular features of nar-
14 cotics, about the picture, about information be-
15 cause you will have to evaluate when you go into
16 the jury room to determine the issues in this case
17 which are only two basically; either guilty or not
18 guilty. What I am saying to you in my humble way
19 trying to evaluate what has taken place here is
20 that the government has failed to produce evidence
21 to satisfy beyond a reasonable doubt.

22 I have said there were people missing here.
23 I told you about Thomas. I developed on cross-
24 examination about the existence of Spring and
25 Vasquez who are part of this unit. Were they
called by the government after Mr. Velez-Diaz took
the witness stand to show anything contrary to what
Balmer testified to or to support anything that

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2 Detective Balmer testified to, and you have a
3 right to ask yourselves why didn't the government
4 when they were told about two men of the police
5 department sent there by Heckman, after I devel-
6 oped it on cross-examination that they went to
7 this apartment. Why didn't they call these two
8 cops in their unit? You have a right to ask your-
9 selves why weren't they called.

10 Were they not called because they could not
11 support this case; because they could not help the
12 government, or what was the reason? Particular
13 in light of Mr. Velez-Diaz having taken the witness
14 stand and telling you that two men on that day did
15 come to the apartment and that they posed as Post
16 Office people trying to check out something about
17 stolen letters which they had in their hand, those
18 letters coming from the mailbox; were those two
19 men Spring and Vasquez? You have a right to assume
20 that this was a trick to get into the apartment by
21 these two men and you remember they were taken into
22 the kitchen because there was painting going on in
23 the front room and this is the same kitchen that Mr.
24 Weinbach tells you: well, how would Detective Balmer
25 know about what was in the kitchen or how the kitchen
was set up.

Strange, isn't it? Peculiar. This is the gov-
ernment prosecuting a case. Mr. Weinbach can tell

2 you we don't have to bring all of our witnesses
3 down. True, but when an issue is raised such as
4 I was able to raise, not because of Mr. Weinbach
5 but because of my examination, you can see that
6 Mr. Weinbach's observation to you that the only
7 important thing in this case is Balmer's testi-
8 mony, well, is that true, or is everything that
9 happens in a case important in the light of day,
10 in light of seeking the truth?

11 So it is not a simple issue of speculation
12 or surmise or conjecture. We have something live
13 here. You saw the demeanor of the witnesses which
14 you also have the right to take into account in
15 weighing their testimony. You can recall on many
16 occasions Detective Balmer's attitude and his
17 evasiveness before he would respond to a question.
18 That, too, you have a right to place your judgment
19 on and give such credence to as you desire.

20 I have been trying to pinpoint in my mind and
21 in addressing you things which I think were impor-
22 tant. I know that it is impossible to cover every-
23 thing which either Mr. Weinbach or myself can re-
24 call which may have left a greater impression with
25 you than I am thinking about at this moment and,
of course, Mr. Weinbach is going to have an oppor-
tunity to rebutt everything that I have said. When
he gets through, I will not have a further opportun-

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of addressing you and I am through as far as talking to you for the last time.

So I beg you, all of you, if there is some feature of the case or many features of the case that have been brought out during the trial both on direct examination and cross-examination which you feel important, please do not disregard it. Consider it because, as I say, I have no printed record. I only go by my notes and I have tried to put down in my notes what I thought was important and to you other things may have become more pronounced.

There was another thing that was asked which may be important to you. I asked whether the glaucine envelope had been checked for fingerprints. I had asked whether the the \$10 bill which supposedly was handled--and I use the word "supposedly" advisedly--by Mr. Velez-Diaz and the answer is no. These are trained police officers. One might argue it was not important. What then becomes important in a criminal case; what they believe to be important or what we all collectively think is important? These are little things in a case, whether civil or criminal that may break a case. It is not the big things because the little things develop during the course of a trial magnify either the importance or the lack of importance of

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the man in the picture box. The little things.

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When you place the little things against the big

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things, you see the flaws, the cleavages that

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develop, the cracks in the argument that alone is

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sufficient to give you reasonable doubt that the

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prosecution has not--and I emphasize has not--

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proven the guilt of Mr. Velez-Diaz beyond a reasonable doubt.

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I want you to act as my co-counsel if I have

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overlooked something. I would like you to do the

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same thing for Mr. Weinbach because when I sit down,

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my duty to my client is concluded. I can go home.

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I can feel in my mind that I did the best that I

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could under the circumstances in connection with

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this particular case. Mr. Weinbach, as far as

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this case, it is just another case in his office.

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When this is over, he picks up another file, pre-

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pares the other file and goes about his routine on

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behalf of his office. So when he is finished with

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you, he has finished performing his duty.

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The important duty in this case is the duty of

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you twelve people who have a very serious responsi-

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bility, serious to the extent that either this man

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is found guilty which means he is deprived of his

liberty, or he is found not guilty and he is acquit-

ted. You have to judge everything and evaluate every-

thing that has transpired in this courtroom. You

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2 are the sole judges of the facts and no one else
3 can tell you how to decide those facts. But in
4 evaluating those facts, take everything into con-
5 sideration; the breakdown, the failure to bring
6 witnesses--important.

7 Mr. Weinbach might say to you, well, this
8 black man that was in the apartment helping with
9 the painting, why didn't the defense call this
10 black man. Again, two things. There is no obli-
11 gation for me to call anyone as a witness under
12 our law. Number two, even if he had been called,
13 if you are to believe or accept that this black man
14 was in the apartment when Balmer went in there with
15 Thomas, he was not in the kitchen. So what could
16 he testify to? He could testify to the two men
17 coming into the apartment, meaning the two Post
18 Office men who walked into the kitchen with Velez-
19 Diaz. Would that enlighten you in any regard?
20 Would that throw any light on the subject matter?
21 So that, again, there was no obligation on my part
22 to bring this man in and too, for that matter, there
23 was no obligation for Velez-Diaz to take the wit-
24 ness stand, but he did. He exposed himself to each
25 and every one of you.

26 You have now an identification by two officers,
27 Heckman and Balmer; inconsistent. You have heard
28 the testimony of Mr. Velez-Diaz as to how he was

1 dressed on that day, what his physical condition
2 was, meaning his facial condition about his scar.
3 So you have three different descriptions.
4

5 Again, it is a challenge. How do you re-
6 solve it; by what this Detective Balmer says? Is
7 that the way you resolve it or do you evaluate the
8 entire case on every piece of evidence which re-
9 flects this case and your judgement is final in this
10 case.

11 If I have spoken too long or become too vocal,
12 forgive me because I get carried away and I want to
13 thank each and every one of you because I know that
14 when you consider all of the facts in this case, I
15 am sure your verdict will be one of acquittal and
16 my client will be going home. Thank you very much.

17 THE COURT: Take a short recess.

18 (Upon, the jury left the courtroom.)

19 MR. KATCHER: In the afternoon, I said I would
20 let the jury know that I have the right to call
21 this man if I wanted to, but it was not my burden.

22 THE COURT: What did you say?

23 MR. KATCHER: The same thing.

24 THE COURT: No, you did not.

25 MR. KATCHER: I said I had a right to call the
man but it was not my--

THE COURT: I am disappointed. It does not
matter. In my opinion, it will not affect the out-

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come of the case but to think that a lawyer enters into an agreement and violates that, that disturbs me. That is all.

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MR. WEINBACH: I also object to the absolute misstatement of the law. Not only was there a violation of this agreement but then Mr. Katcher told the jury you may draw an adverse inference against the government.

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THE COURT: It is possible if they make certain findings that I am not prepared to make the charge.

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What do you intend to say about it?

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MR. WEINBACH: I would like to know what kind of charge you would give.

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THE COURT: I am going to have to charge, in light of this summation, if they find out any witness would have given testimony material to the issues of the case, if he was under the direction and control of the government, that they might draw an inference if he was called that he could give adverse testimony to the government.

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On the other hand, that the jury be advised that Mr. Thomas was under the government's subpoena and ready to be produced when the defendant waived his right to be called. Do you agree?

MR. KATCHER: I told you yesterday I had no intention of calling him; is that correct?

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THE COURT: I want to be able to tell the jury. They do not know that.

MR. KAICHER: You will also have to tell the jury that in light of that, the defendant has no burden to produce any government witness.

THE COURT: Of course, I will say that, but you gave the impression the government was hiding him.

MR. KATCHER: I made mention of my witness, your honor, and I saw no necessity of bringing him because he could not add anything.

THE COURT: At the time you said it, I thought it was terrible; a complete violation of everything you agreed to yesterday.

MR. WEINBACH: I have a couple of other points. I want to go into rebuttal but I would like the court's views. Mr. Katcher went into some detail about why didn't we arrest Mr. Velez-Diaz. I would like to let the jury draw the inference that one of the reasons that they did not go back to arrest him was that they wanted to find the source from where Mr. Velez-Diaz--

THE COURT: You cannot go that far. You have to be careful and make sure that your argument is based on the evidence. The evidence is that you sent them to make a purchase. He made a purchase. You took \$10 expecting to come back again and I

2 think from that, you may fairly say that the reason
3 the arrest was not made because they intended to
4 develop the case and, otherwise, the case would
5 stop there.

6 I am not going to permit you to argue that
7 there are others involved and they were after the
8 others. Maybe a natural inference would be that
9 they would make a larger catch, but I am now con-
10 cerned with confining the government to the evi-
11 dence and just the fair inference to be drawn.

12 MR. WEINBACH: On the missing witness in-
13 struction, I would ask the court to advise the jury
14 that since the defendant has put on a case, al-
15 though he did not have any obligation to subpoena
16 anyone, he had the power not only for Mr. Thomas
17 but for the government agents and Mr. Bassett.

18 THE COURT: I am not going to tell this jury
19 that he had the obligation of bringing in Bassett.
20 I won't do that. I will read part of Mr. Katcher's
21 charge which said that where a witness is equally
22 available to both sides, no adverse inference may
23 be drawn.

24 MR. WEINBACH: I do not see how the jury
25 could make that determination. I think the court
made that determination yesterday.

THE COURT: Which one?

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MR. WEINBACH: With respect to Thomas.

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THE COURT: I cannot do that. That is a matter for the jury.

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MR. WEINBACH: How are they going to make that determination? There is nothing in the evidence. That was the whole problem. How can they make that determination? I cannot.

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THE COURT: The only thing I can say and will allow is that I will make that charge and you can argue that the last relationship this witness had with the government was whenever it was.

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MR. WEINBACH: I would rather not even go into it.

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THE COURT: I cannot tell you what to do, only what I will charge. You can argue from that there is no showing that this informer is under the influence or control of the government now--that is the point--now what the relationship was at one time. I cannot tell.

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The thing that crossed my mind is I can let the government reopen the case and bring Mr. Thomas in. That is an alternative. I can only tell you what I can do and what I cannot do. I cannot protect you against a breach of contract.

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MR. KATCHER: I thought I covered that. I didn't have to.

1 THE COURT: In the future, I will not accept
2 your word at face value as I may have in the past.
3 A lawyer cannot do that to me and not have me re-
4 member. Some lawyers if they say black is white,
5 I will remember it and I will accept it. Some I
6 don't take at all. If they say it is black, even
7 if I know it is, I won't believe it. Between those
8 extremes there are variations. I am just disap-
9 pointed with the manner in which you made that
10 reference.

11 MR. WEINBACH: I would like to note also my
12 strong objection to what I think was an intentional
13 misrepresentation on Mr. Katcher's part. He knows
14 that Detective Balmer has seen Mr. Velez-Diaz prior
15 to his testimony. There was no need in his summa-
16 tion to say this was the first time he had seen him.

17 MR. KATCHER: I did not say that at all.

18 THE COURT: I do not know whether that is clear.
19 I do not think that Detective Balmer testified that
20 he had seen him. I think he might have seen him
21 around but not recognized him--Mr. Velez-Diaz you
22 are talking about?

23 MR. WEINBACH: Yes.

24 THE COURT: No. I think from my recollection,
25 he did not see him until the same day he made the
sale.

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2 MR. WEINBACH: I am talking about the fact
3 that Detective Balser supposedly never saw him
4 from the time of the sale till the day he got on
5 the stand.

6 MR. KATCHER: I did not say that.

7 MR. WEINBACH: That is my recollection. The
8 record won't lie.

9 THE COURT: There is no sense arguing about
10 that. It is a minor point. Anything else?

11 MR. WEINBACH: Just one thing on that missing
12 witness. Are you going to say that no adverse in-
13 ference can be drawn if it is shown that either
14 party had equal access to the witness?

15 THE COURT: That is right. Bring the jury in.
16 (Whereupon, the jury entered the courtroom.)

17 THE COURT: Mr. Weinbach.

18 MR. WEINBACH: Ladies and gentlemen of the jury,
19 this is rebuttal summation. I will try to be brief.

20 Mr. Katcher, in his summation, reviewed the testi-
21 mony of at least four government witnesses. I will try
22 to go through that. You may recall he reviewed the
23 testimony of the chemist Mr. Manning, and tried to
24 create in your minds an impression that Mr. Manning
25 was unsure of what the substance is in Government's
Exhibit 2B, and he stated something about a report
that says: "resembles cocaine."

You may recall that after the cross-examination

1 of Mr. Manning, I asked him three short questions.
2 Have you ever met Mr. Velez-Diaz? Do you know Mr.
3 Velez-Diaz? No. Do you have any doubt whatsoever
4 that this is cocaine? No. It is not sugar. It is
5 cocaine.
6

7 Then I would like to correct what I seem to
8 recall of a question asked of Mr. Manning on cross-
9 examination by Mr. Katcher. Mr. Manning, do you
10 make mistakes? I recall the testimony was, yes I
11 make mistakes. Who doesn't make mistakes.

12 If there is anyone in this court room who does
13 not make mistakes, he does not belong here. Every-
14 one makes mistakes. The issue was was a mistake
15 made with respect to the analysis of this. Is there
16 anything in the evidence which shows that this is
17 anything but cocaine?

18 Now, with respect to Detective Balmer, it is
19 easy to get up here and make inuendos and infer-
20 ences that Detective Balmer was somehow acting cor-
21 ruptly, that he was not searched by his fellow po-
22 lice officers and what happened with the \$590.

23 Remember, a question was asked: well, Officer
24 Heckman, do you know whether or not Detective Balmer
25 gave the \$590 ? No, I don't. Well, I submit to you,
26 ladies and gentlemen, that if Detective Balmer kept
27 that \$590 for himself, how did this get here (indi-
28 cating), this sugar. Was it brought here? That \$590

1 was given to that man (indicating).

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3 Do you have any questions whether or not the
4 \$10 was returned? Take a look at Government's
5 Exhibit 6 in evidence, the registration of the
6 money. You will see there is an entry of \$10. Then
7 it has the serial numbers of the \$10 note not used.
8 The money was given. There is no question about
9 that. We would not have a case here if cocaine
10 was not bought, if there was anything irregular
11 about what happened.

12 The language that was used, there is no point
13 in going over that. To make one point, if Mr.
14 Velez-Diaz knows any language, he knows the lan-
15 guage of money and cocaine. That is the language
16 he knows. He knows dollar bills. He knows ten dollar
17 bills. He knows how much does coke cost. He knows
18 how to respond to that.

19 Now, how did Detective Balmer remember Mr.
20 Velez-Diaz? These are hundreds of people through
21 the years. How would he remember Mr. Velez-Diaz?
22 I asked you to consider what kind of transaction
23 we are talking about and I ask you to consider who
24 Detective Balmer is. He is an undercover police
25 officer. He works in street clothes. He told you
this is a dangerous business. He makes buys from
people of narcotic substances. We do not ask him
to tell us in the courtroom whether that is the man

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2 you purchased grapefruit from at the A&P. Is that
3 the man you saw in a car at Shea Stadium? We asked:
4 Is that the man you bought cocaine from?

5 Ask yourselves, whether it is reasonable to
6 assume, given the nature of that occupation and
7 what he was doing on that day, to remember a face,
8 a man who he must have been standing as close to me
9 as this table. Isn't it reasonable to assume that?

10 Aga', I would ask you to forget, to ignore
11 what I submit to you is nothing but a tactical e-
12 vasion and confusion concerning what happened after
13 August 7, 1973. We have gone over and over it again.
14 We did not arrest Mr. Velez-Diaz for the reason that
15 they wanted to buy more. If they would have arres-
16 ted him, that would have ended the case. They
17 wanted to find out more about Mr. Velez-Diaz, how
18 much cocaine he had to sell. To arrest him on that
19 day or the next day, they would never have know.

20 I believe Mr. Katcher stated during the sum-
21 mation that police officer Heckman never knew the
22 name of Mr. Velez-Diaz before the actual transac-
23 tion on August 7. My recollection does not count.
24 It is yours that counts but I will recall on direct
25 examination that he stated, yes, Mr. Thomas told me
that the man at 419 Franklin Avenue is Mr. Velez-Diaz.
But it is your recollection that counts.

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2 There is something interesting about this doc-
3 ument, the car registration. I will admit it. For
4 a long time it did not look like an important doc-
5 ument but it does establish that this man lives at
6 419 Franklin Avenue. Then recall the testimony on
7 cross-examination of Mr. Velez-Diaz. Then ask your-
8 self the importance of what seems to be fairly in-
9 significant. You will recall Mr. Velez-Diaz's tes-
timony.

10 Now, this is where the conspiracy or the plot
11 thickens. Various people are brought out by Mr.
12 Katcher's summation. Why didn't the government
13 call this man or that man or this police officer?
14 You have to judge whether or not Mr. Velez-Diaz
15 sold the cocaine on the basis of the evidence. The
16 government has absolutely no obligation to bring in
17 everybody in the world who may have had some role
18 in this transaction. If we have not proved the case
19 through Detective Balmer and Police Officer Heckman,
20 you will walk Mr. Velez-Diaz out the door. If we
have not proved it with that evidence, walk him out.

21 Judge Mishler will instruct you on the law and
22 tell you about the availability of witnesses and I
23 will trust his instructions to you, and listen care-
fully to what he says.

24 One final point, and I think it was a very
25 telling phrase that Mr. Katcher used. He said little

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about the testimony of his own client who took the stand. Most of the words he used was directed to characterize the testimony of the government witnesses. He hardly said a word about what Mr. Velez-Diaz said. No wonder, after what he said on the stand. He said one thing. He said the defendant exposed himself to you.

I submit, ladies and gentlemen, Mr. Velez-Diaz exposed himself to you in all candor. He told you the baldface lies. He told you he didn't understand English and he made up a story that, I submit, you cannot believe, that you must convict him on. Thank you very much.

THE COURT: We will take a short recess and then I will charge you on the law of the case.

(Whereupon, the jury left the courtroom and a recess was taken.)

THE COURT: Bring the jury in.

(Whereupon the jury entered the courtroom.)

THE COURT: Madam Foreman, ladies and gentlemen of the jury. It now becomes my duty to instruct you on the applicable law. A good starting point is to explain and define the role that the various participants in the trial play.

First, we have the lawyers. Lawyers are adversaries, protagonists. They represent the side of the issue. They each take sides on the issues in the

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case and so they are partisans.

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The court and the jury, on the other hand, are objective, impartial and are both judges; the jury the judge of the facts.

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In other words, you will be called upon to decide whether Detective Balmer purchased thirty-four plus grams of cocaine for \$600 or \$590 on August 7, 1973 in apartment one at the premises 419 Franklin Avenue in Brooklyn. You will be called upon to decide whether the defendant, Jose Gabriel Veloz-Diaz, sold the same thirty-four plus grams of cocaine at that time and place and whether he did it knowingly and intentionally; in other words, whether he was aware of what he was doing.

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They are the vital issues in this case. They are what we call the essential elements of the crime charged. Having made that determination, then, in accordance with the law as the court charges it, you will come to a decision as to the guilt or innocence of the defendant on the crime charged but you must understand you and you alone make the fact findings I have nothing to do with that. I have no opinion as to the guilt or innocence of the defendant. I have no opinion as to how you should find.

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You, on the other hand, have the obligation of accepting the law as I charge it even though you may disagree with it. Citizens have strong feelings

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2 about narcotics laws. It is the Congress that
3 passes the law it is for the court to interpret
4 the laws that Congress passes. It is for the jury
5 to accept that interpretation as the law of the case
6 on which they sit.

7 You have no right to decide for yourselves
8 what the law should be and apply that law. Even
9 if you disagree with the law, you have the absolute
10 obligation of accepting it. It makes for uniformity,
11 predictability throughout the country and that is the
way it should be.

12 The lawyers during the trial have the obliga-
13 tion of accepting my rulings here. They are ab-
14 solute and they are binding. They may disagree
15 with it but that is for this case. Lawyers at times
16 are admonished or reprimanded but that has nothing
17 to do with the merits of the case. There is nothing
18 personal in my rulings, my reprimands, my admonitions.
19 They are a way of maintaining order and control in a
20 case, again, under the rules of law as the lawyers
understand them and accept them.

21 Do not charge the performance of a lawyer a-
22 gainst the client if you do not like what a lawyer
23 does. This case belongs to the client. The lawyer
only represents the client.

24 The presumption of innocence has been brought
25 to your attention from the outset of the case during

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2 he so-called voir dire which is the French term for
3 examination we conduct to determine the qualification
4 of jurors. It is a strong presumption in Anglo-
5 American Law. It means that you must conclude at
6 the outset of the trial that the defendant is in-
7 nocent of the crime charged and that conclusion is
8 maintained throughout the trial and throughout your
9 deliberations, and is enough to acquit a defendant
10 unless the government proves the guilt of the defen-
dant by proof beyond a reasonable doubt.

11 I would like to think of the Scotch verdict as
12 an example of what that principle means. In Scotland
13 there are three verdicts: guilty, non guilty and
14 not proved. In this country, we have only two ver-
15 dicts: guilty or not guilty. Not guilty includes
16 not proved. So the government must prove the guilt
17 of the defendant by proof beyond a reasonable doubt.
It must overcome that presumption of innocence.

18 A reasonable doubt is a doubt which a rea-
19 sonable person has after weighing all of the evi-
20 dence in the case. It is a doubt based on reason
21 and common sense and the state of the record in the
22 case, which means the evidence in the case. It is
23 distinguished from the kind of emotional doubt you
24 might have from the disinclination from performing
25 an unpleasant task like finding a defendant guilty
after the evidence showing guilt beyond a reasonable

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2 doubt. It is the kind of doubt that is distinguished
3 from pure speculation or imaginary doubt, some vague
4 suspicion that you have. It must be based on the
5 evidence in the case.

6 A reasonable doubt is the kind of doubt that
7 would make a reasonable man hesitate to act in a
8 matter of importance to himself or herself. Proof
9 beyond a reasonable doubt is, therefore, proof of
10 such convincing character that you would be willing
11 to rely and act upon unhesitatingly in the most im-
portant of your own affairs.

12 The government's ^{*}burden is not to prove the
13 guilt of the defendant beyond all doubt nor is it
14 the government's burden to prove each and every bit
15 of evidence offered before the jury to be true beyond
16 a reasonable doubt. The government's burden is to
17 prove the essential elements of the crime charged
18 beyond a reasonable doubt and I will list them again
19 to you later in the charge, but I have already in-
20 dicated to you, one, that the defendant on August 7,
21 1973 distributed approximately 32 grams of cocaine
22 and, two, that the distribution was done knowingly
23 and intentional. In other words, he was aware of
24 what he was doing. He knew he was dealing in co-
25 caine, sold it as cocaine and what he did he did in-
tentionally and not by pure accident.

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The defendant has the right to rely on the failure of the government to prove his guilt beyond a reasonable doubt. He need not offer any evidence at all. In this case, he did take the stand and offered his testimony and told you what he says happened on August 7, 1973.

You may find that the Government failed to sustain its burden by not alone what is in the record but by the failure to offer proof. Something was said about the failure of the Government to produce the informant, James Thomas.

Where a party, in this case the Government, has a witness under its control and influence and that witness has information material to the issues in the case, the failure from the government to produce that witness, the jury may infer that had the witness been brought to testify before you, that the witness would give testimony unfavorable to the Government. You must determine from evidence whether that witness is presently under the control or influence of the Government and whether that witness would give testimony that is material to the case before you may draw the inference, because if it appears in the record that the witness is available to both parties, then no adverse inference may be drawn.

In this case, I am free to say, with the defendant's consent, that the Government had the informer, James Thomas, under subpoena and was ready to bring the informer to court and made available to the defendant, and the defendant waived his right to examine the informer, James Thomas.

Of course, again, you must keep in mind the burden of the Government. It is the Government that must prove the guilt of the defendant beyond a reasonable doubt. You must also keep in mind that the defendant need not produce any evidence. The defendant was not obligated to examine the witness, James Thomas.

What is evidence? Evidence is the method that the law uses to prove a disputed fact. There is direct evidence and indirect or sometimes called circumstantial evidence. Circumstantial evidence is a method of proving a disputed fact by drawing fair and reasonable inferences or an inference based on an established fact using your good common sense and experience. I will use the example I have used so many times before. If you were sitting here as a juror in a civil case--and the jury uses the same method of drawing inferences as in a criminal case--if my courtroom deputy, Mr. Adler and myself were on the corner at a particular evening where a stop sign was erected and if I were speaking with him

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2 facing the stop sign and the roadway and I saw a
3 motor vehicle coming down the roadway, pass the
4 stop sign without stopping and striking an individual,
5 let's say a woman, that would be direct evidence
6 of the issue as to whether that motor vehicle
7 stopped at the stop sign. I saw the motor vehicle
8 pass the stop sign without stopping.

9 Let's assume that the woman that was hurt
10 sued the driver of the car for personal injuries.
11 The issue in that case being did the motor vehicle
12 pass a stop sign without stopping; the plaintiff,
13 of course, saying that is just what happened; the
14 defendant saying no I stopped first and then passed
15 the stop sign.

16 If I were called as a witness to testify. I
17 would give the testimony I just stated. If my
18 courtroom deputy Mr. Adler, were to testify, he
19 could not testify directly on that issue. He might,
20 in fact, say: I was talking to the judge and as I
21 turned to my right, I saw this white 1976 Cadillac
22 traveling at about sixty miles per hour. It passed
23 behind me. I lost sight of it for two or three seconds.
24 About one hundred feet later, I looked to the
25 left and it was traveling at the same rate of speed
and it struck the plaintiff. "

There are the circumstances from which you may
reasonably draw the inference that that motor vehicle

passed the stop sign without stopping. He lost sight of it for two or three seconds. It traversed one hundred feet. Our good common sense and experience leads us to infer that that motor vehicle could not have stopped at the stop sign and then started from scratch and proceeded in that time and then struck the plaintiff. So there you have it. One is direct evidence on an issue. The other is circumstantial evidence.

The law does not hold that one form of evidence is of better quality than the other. It requires the Government to prove the guilt of the defendant by both types of evidence by proof beyond a reasonable doubt.

What is the evidence in the case? It is the sworn testimony of all of the witnesses regardless of who called them. They are all listed before you. The exhibits that are marked in evidence, and upon that and the inferences you draw based upon your good common sense and experience, you will arrive at a verdict.

I think it is important for you to understand what is not evidence in the case. The statements made by the lawyers to you in both the opening and the summation is not evidence in the case. As I indicated, the opening was intended to alert you to the testimony that was to come so that you might

more easily follow it.

The summations are arguments made by the lawyers focusing attention on what they regarded as the important evidence and the important issues of the case. But, they prefaced their summations and if they did not preface someplace during the summations, they warned you they might be inaccurate in recounting the testimony. It was only your recollection. It is your recollection that counts. Neither attorney attempted to distort the evidence. Those things happen.

During your deliberations, if you want to hear any of the evidence back, it will take time. Everything we say, everything that has been said is recorded and the reporter will read it back to you.

Statements made by the court is not evidence in the case. Any random statements you may have heard even about the courthouse, I alerted you to the danger of coming in contact with anyone. So I assume it did not happen, but if it did, just disregard it. Any side remark you may have heard, it is not part of the case.

The evidence is sworn testimony; the direct, the cross-examination, redirect or recross. That is the evidence, and the exhibits. Evidence stricken from the record, when I said, "strike it from the record," just as it is physically stricken from the court reporter's record, figuratively it is

1 stricken from your mind and memory and may not be
2 considered.
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4 At times, objections were sustained to objec-
5 tions made by counsel. You may not speculate on
6 what the answer might have been for the same reason.
7 It was not answered and not in the record and you
8 may not consider it.

9 I would like to define the difference between
10 an inference and a presumption. An inference is
11 a conclusion which reason and common sense leads the
12 jury to draw from facts which have been established
13 by the evidence of the case. The drawing of an in-
14 ference is discretionary with the jury and I have
15 given you two examples of drawing an inference.
16 One is determining a disputed fact through circum-
17 stantial evidence and the other inference you may
18 draw from the failure to call witnesses. I might
19 say from the failure to call witnesses, in determin-
20 ing whether testimony is material, you make a deter-
21 mination to whether the evidence that the witness
22 might have given is cumulative, whether it simply
23 adds to the testimony already had and serves no
24 other purpose.

25 When reference was made to the failure to
bring other surveilling agents in addition to de-
tective Heckman the example I sometimes give is,
well, suppose the batter in a baseball game hit the

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2 opposing catcher on the head with his bat and the
3 catcher sued the batter for personal injuries. Well,
4 if it were Yankee Stadium and we had fifty thousand
5 people there, we would not have to bring every one
6 who saw the incident down to testify. You might
7 bring the umpire or the manager down, but there
8 comes a time when on that issue, did the batter
9 strike the catcher, that it is purely cumulative
10 and serves no purpose. So you make that determin-
11 ation when you determine the materiality of bringing
another witness down.

12 Presumption, on the other hand, is a conclusion
13 which the law requires the jury to make and con-
14 tinues only so long as it is not overcome or out-
15 weighed by evidence in the case to the contrary.
16 The example of that, of course, is the presumption
17 of innocence. Unless the presumption is outweighed,
18 then the jury is bound to find importance with the
presumption.

19 You, the jurors, are the sole judges of the
20 credibility of the witnesses, which means the
21 believability of their testimony and the weight
22 their testimony deserves. Scrutinize the testimony
23 given and the circumstances under which each witness
24 testified and every matter in evidence which tends
25 to show whether a witness is worthy of belief. Of
course, as I warned you at the outset, you do not

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take into consideration the fact that Detect v
Balmer and Detective Heckman are detectives. You
judge their testimony like any other witness.

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Take into consideration the intelligence of
the witness, in the defendant's, Veloz-Diaz case,
his inability to speak the language fluently, the
degree of his ability to express himself in the
language is a matter for the jury. You saw him.
You heard testimony concerning that capability.

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Take into consideration the witness's motive
and state of mind. Why is he testifying? What is
his state of mind while he is testifying before you?
Take into consideration his demeanor and manner
while on the witness stand. Did the witness answer
fully and fairly to the questions put to him? Was
the witness evasive? Take into consideration the
witness's own ability to observe the matter as to
which he has testified; whether he should impress
you as having an accurate recollection of these
matters.

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Take into consideration the relation each
witness might bear to the outcome of the case.
Take into consideration the manner in which witness
is corroborated or contradicted by other testimony
in the case. If a witness should knowingly have
testified falsely concerning the material fact,
you have a right to disregard all that witness's

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testimony on the theory that he is unworthy of belief. On the other hand, you, if you wish, accept so much of his testimony as you recognize as believable, discarding, of course, that portion that you recognize as being untruthful.

Again, that principle underscores the broad disgression and authority that the jury has in weighing and assessing the credibility of witnesses. The defendant need not testify in his own behalf but when he does, as in this case, you are charged to weighing the believability, the credibility of his testimony by the same rules, the same standards as any other witness.

Turning to the charge in this case, the indictment reads as follows: " on or about the seventh day of August, 1973, within the Eastern District of New York, the defendant Jose Gabriel Velez-Diaz, did knowingly and intentionally distribute approximately 34.39 grams net weight of cocaine hydrochloride, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, Section 841 (a) (1).

Of course, the indictment and the reading of the indictment is not proof of the charge. The proof of the charge must come from the witnesses and the exhibits; the evidence.

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2 The defendant pleaded not guilty to the charge
3 of this indictment. As I said, the Congress defines
4 federal crimes. In 1970, the Congress enacted what
5 is known as the Drug Abuse and Control Act of 1970,
6 which closely supervises the manufacture, importation,
7 possession, distribution and use of certain drugs.
8 It made a list of drugs and composed certain schedules
9 and so the Drug Abuse and Control Acts speak in
10 terms of controlled substances, the different types
11 of controlled substances.

12 Cocaine or cocaine hydrochloride, the chemical
13 and technical name for it, is listed in Section 812
14 of Title 21 in Schedule II in the following language: "cocoa leaves and any salt compound derivative or preparation of cocoa leaves and any salt
15 compound derivative prepared thereof which is chemically equivalent or identical with any of these
16 substances. " I charge you that cocaine hydrochloride is a Schedule II controlled substance.

17 The act prohibits the distribution, which, in
18 effect means the sale or distribution of cocaine in
19 this brief language--I won't read the entire section.
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21 " It shall be unlawful for any person knowingly
22 or intentionally to distribute a controlled substance. "
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2 The indictment that I read is based on that sec-
3 tion. That is why Section 841 (a) (1) is cited.
4 Most of our Federal Law is codified and there is
5 Title 21, Food and Drugs. That is why the section
6 is cited in the indictment..

7 So in order to sustain this burden of proof,
8 the Government must prove beyond a reasonable doubt
9 one, that on August 7, 1973 Jose Gabriel Velez-Diaz
10 sold thirty four or approximately 34.39 grams of
11 cocaine hydrochloride to Detective Horace D. Balmer;
12 two, that such sale or distribution, to use the spe-
13 cific words of the act, was knowing and intentional;
14 in other words, that he was aware that the substance
15 that he was selling was cocaine and that it was not
16 by pure accident that he happened to be selling a
17 substance and he did not know what it was; and
18 that what he did was a voluntary, and an intentional
19 act.

20 If the Government proved those two essential
21 elements by proof beyond a reasonable doubt, then it
22 is your duty to find the defendant guilty of the
23 crime charged. If the Government failed to prove
24 either of those elements by proof beyond a rea-
25 sonable doubt, then it is your duty to find the de-
fendant not guilty.

26 You will shortly be excused from the courtroom
27 to deliberate on the matter. Each juror must decide

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2 he case for himself and herself. Do not rely on
3 one of the other jurors to make your decision for
4 you. That would not be giving the parties twelve
5 separate verdicts, which they are entitled to.

6 On the other hand, it would be improper for any
7 juror to take an intransigent position and refuse to
8 budge without talking to his or her fellow jurors.
9 The jury process is a deliberative process. You
10 exchange ideas and talk about the evidence and if
11 based on the evidence you can arrive at a unanimous
12 verdict, then it becomes the verdict of this case.

13 During your deliberations, you may have occasion
14 to communicate with the court and you do that through
15 your foreman. All notes, through the foreman. The
16 foreman has the obligation of funneling everything
17 that the jury wants to convey to the court. Do not
18 tell me at any time how you stand in your voting.
19 If you are six to six, ten to two, eleven to one,
20 I am not interested. However, when you have arrived
21 at a verdict, then send a note to me and say we have
22 arrived at a verdict. Do not tell me what the ver-
23 dict is. Do not say guilty or not guilty. Just say
24 we have a verdict.

25 When I get the note, I will call you into the
courtroom and I will ask you to stand and, in effect,
I will say: in the case of United States of America
against Jose Gabriel Velez-Diaz how do you find the

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defendant; guilty or not guilty. You will tell me the verdict of the jury. Then I will poll the jury and ask each juror whether that was his or her verdict. If in open court all the jurors agree that was the verdict, then for the first time it becomes the verdict, not before then.

You may want to have some testimony read back to you. If you do, try to be specific. Identify the witness, if you can. Identify the subject matter. It will take a long time to find the material. It is all on this spaghetti like tape that the reporter makes the imprint on and they will have to find the specific information you want. When that happens, then I will call you into the courtroom and have the reporter read it back. The same thing goes for the exhibits. I will not send the exhibits in but if you ask for the exhibits, I will send them into you.

For the moment, I would ask you to leave the court so I can discuss a matter with counsel. The jury is excused.

(Whereupon the jury left the courtroom.)

THE COURT: Mr. Weinbach, any exceptions or additions?

MR. WEINBACH: No exceptions.

MR. KATCHEL: No exceptions.

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THE COURT: Thank you.

MR. KATCHER: There is one addition, I think. Your honor started to speak about the burden of proof but your honor failed to instruct the jury that the burden of proof which rests upon the Government never shifts. It remains. Other than that, I think your honor covered every other aspect.

THE COURT: Fine. Thank you.

MR. WEINBACH: Would there be any objection to having the jury have the exhibits since they are so few, with the exception of the cocaine?

THE COURT: I never send them in until they ask for it. I could not understand why you did not distribute them amongst the jury during the trial.

Seat the jury.

(Whereupon the jury entered the courtroom.)

THE COURT: Because of what I said about the presumption of innocence, I think you understand the burden the Government has to prove the guilt of the defendant beyond a reasonable doubt never shifts.

At this time, I will excuse the alternates. The alternates may not deliberate with the jury. So you are excused. I will ask you to take your personal things out of the jury room and, of course, your lunch has been ordered and expect it at any moment. I asked the restaurant to deliver the

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2 lunch at twelve-thirty. They never deliver it on
3 time, of course. Would you take leave now.

4 (Whereupon the alternate jurors left the court-
5 room.)

6 THE COURT: Will the clerk please swear in the
7 marshall.

8 (Whereupon the clerk administered the oath to
9 the marshall.)

10 THE COURT: I am going to release the lawyers
11 for lunch and they probably won't get back until
12 one-thirty or quarter of two. It means that if you
13 send me a note, I will not be able to give it my
14 immediate attention. I cannot do a thing about it
15 until I discuss it with the lawyers. So if you do
16 not get an immediate reply from me, do not think I
17 have forgotten about you. I just cannot do anything
18 about it.

19 If you have any questions, you just send them
20 through. I will hold them until the lawyers come
21 back from lunch. As soon as I feel I know what the
22 answer is, I will call you into the courtroom.

23 In the meantime, you are excused for deliberation
24 on the matter before you and I am confident you will
25 perform your duty to the full extent of the oath
that you took to render a true and just verdict.
That means on the evidence, in accordance with the
laws as the court charged it, and free of all bias,

1 prejudice and sympathy. The jury is excused.

2 (Whereupon the jury left the courtroom.)

3 THE COURT: Gentlemen, please return by one
4 forty-five. I would like you here. If there is
5 nothing, you can return to what you were doing,
6 but I expect some questions by then.

7 (Whereupon there was a luncheon recess and
8 court reconvened at one forty-five PM.)

9 THE COURT: The jury is asking for the photo,
10 car registrations and then the question is the date
11 moved which, of course, I cannot answer. Is there
12 anything in the testimony to indicate the date he
13 moved?

14 MR. WEINBACH: I think the testimony was he
15 did not recollect when he moved from 419 Franklin
16 Avenue. That is my recollection.

17 MR. KATCHER: He moved around December, I
18 think.

19 MR. WEINBACH: I think I do recall. The end
20 of 1973, but I am not positive. I think that may
21 be right.

22 THE COURT: Who was the reporter on the trial?

23 THE CLERK: Mr. Stalker.

24 THE COURT: That is Velez-Diaz's testimony?

25 THE CLERK: Mr. Stalker, right.

THE COURT: Tell them we wait the defendant's
testimony on when he says he moved.

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2 Please produce the photo and the registrations.
3 They are exhibits numbers what?

4 MR. WEINBACH: I am turning over Exhibit Num-
5 ber Four in evidence which is the car registrations
6 and Exhibit Five which is the photo.

7 THE COURT: Turn them over to the marshall.
8 You do not need the mail envelope. It could be
9 detached. The mailing envelope and the certified
10 copy is detached and the exhibit is now only the
11 two registrations. Will the marshall please deliver
it to the foreman of the jury.

12 THE MARSHALL: Yes, your honor.

13 THE CLERK: That note from the jury is marked
14 Court's Exhibit Three.

15 THE COURT: Do you remember whether it was on
16 direct or cross-examination?

17 MR. KATCHER: Cross-examination.

18 THE COURT: See if you can find the testimony
19 of Mr. Velez-Diaz when he testified on cross-
20 examination as to when he moved out of the premises
419 Franklin Avenue.

21 Seat the jury.

22 (Whereupon at 2:15PM the jury entered the
courtroom.)

23 THE COURT: You asked for two exhibits and
24 they were sent in. Then you asked for the date
25 moved. I cannot answer the question because it

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2 depends on what the evidence shows and you are sup-
3 posed to make that determination, if it is of a sig-
4 nificance to you.

5 All I can do is ask the reporter to read the
6 questions concerning Mr. Velez-Diaz' occupancy of
7 419 Franklin Avenue, Apartment 1, and those questions
8 which relate to when he got out.

9 I am asking the reporter to do that.

10 (Whereupon Mr. Raymond Stalker, acting official
11 court reporter, read from the trial transcripts from
12 page ____, line ____ through page ____, line ____.)

13 THE COURT: That is all the evidence that the
14 reporter was able to locate concerning the question
15 that you asked. The jury is excused.

16 (Whereupon, at 2:15PM the jury left the court
17 room.)

18 (Whereupon, at 3:57PM a note was received from
19 the jury.)

20 THE COURT: I understand that Detective Beck-
21 man's log is not in evidence?

22 MR. KATCHER: That is correct, sir.

23 MR. WEINBACH: That is correct.

24 THE COURT: All I will do is bring the jury in
25 and tell them it is not part of the record. It is
not in evidence.

26 THE CLERK: Note from the jury marked Court's
Exhibit Three for identification.

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(Whereupon, at 4:00 PM the jury entered the courtroom.)

THE COURT: I am sorry I cannot be too helpful on your last request because this exhibit was not marked in evidence. Some exhibits are marked for identification. Identification merely means that when the witness referred to a paper, it is identified with a number so that if anyone reads the record and wants to know what the witness was talking about, they can always look at the document to see what the witness referred to. But it is not marked in evidence, and, therefore, is not part of the record. So I cannot supply you with it. The jury is excused.

(Whereupon, at 4:05 PM the jury left the courtroom.)

(Whereupon, at 4:25 PM a note was received from the jury.)

THE COURT: Cigarettes, Pall Mall. Can we order drinks, with \$2.

Mr. Katcher, do you have any objection if I ask the marshall to take their order for coffee and cake?

MR. KATCHER: Of course not.

THE COURT: Tell them if they want to have coffee or other drinks, that is on the house. We do not supply cigarettes. The drinks have to come

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from the coffee shop across the street. I will sign
an order for it. Make it quick.

2465 KATONAH US v. Velez-Diaz

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of August 1976 deponent served the within - Appendix upon:

U.S. Attorney, Eastern District of N.Y.

attorney(s) for

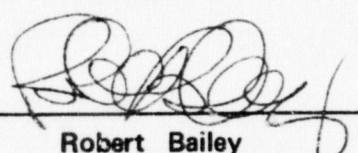
Appellee

in this action, at

225 Cadman Place, East
Brooklyn, N.Y.

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the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


Robert Bailey

Sworn to before me, this 27
day of August, 1976.


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1976